No. 82-2001

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

GUY VANDER JAGT, *et al.*,
Petitioners,

v.

THOMAS P. O'NEILL, JR., *et al.*,
Respondents.

SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

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NOW COME Petitioners Guy Vander Jagt and others, by their attorneys, Miller, Canfield, Paddock and Stone, and call the Court's attention to relevant new cases that have been decided since appellants filed their Petition for a Writ of Certiorari on June 9, 1983:

I.

Chief Justice Burger, in his opinion in *Immigration and Naturalization Service* v. *Jagdish Rai Chadha*, 51 U.S.L.W. 4907 (June 23, 1983) pointed out that a court has a duty to decide cases that are properly before it. Chief Justice Burger quotes Chief Justice Marshall in the famous case of *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821):

> Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment and conscientiously to perform our duty.

51 U.S.L.W. 4914 (June 21, 1983). This is precisely the issue that is presented to this Court in the case at bar.

Justice Burger also points out in the *Chadha* case that, where the authority of Congress is not open to question, *there still may be a question of whether Congress has chosen a constitutionally permissible means of implementing that power.* It is obvious that the Congress has the power to create committees and to assign persons to the committees, but the exercise of such power must be by constitutionally permissible means. Obviously, *it is the duty of the judicial branch to decide whether the exercise of that power offends or fails to offend a constitutional restriction.* To ignore the judicial duty thus presented is to ignore the teachings of these landmark cases.

In the same case Justice Burger referred to the Political Question Doctrine:

> No policy underlying the Political Question Doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Article I, can decide the constitutionality of a statute; that is a decision for the courts. . . . Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implication in the sense urged by Congress.

51 U.S.L.W. 4913-14 (June 21, 1983).

II.

The opinion of this Court, issued June 22, 1983, in *Alan J. Karcher* v. *George T. Daggett*, No. 81-2057, reflects upon the issues which the courts below have refused to face in the case at bar.

Justice Stevens, concurring in the *Karcher* case, said:

> The Equal Protection Clause requires every State to govern impartially. When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or *political*—that may occupy a position of strength at a particular point in time, or to disadvantage a *politically weak segment* of the community, they violate the constitutional guarantee of equal protection.

Slip. Op. at 5 (emphasis furnished). Justice Stevens further stated:

> But in case after case arising under the Equal Protection Clause, the court has suggested that 'dilution' of the voting strength of cognizable, *political*, as well as racial groups, may be unconstitutional.

Slip. Op. at 6 (emphasis in opinion).

As Justice Stevens pointed out, the Equal Protection Clause protects voting rights and *political* groups and requires the absence of any "built-in bias" tending to favor a particular political interest. Justice Stevens notes that the Equal Protection Clause does not make some groups of citizens "more equal" than others, and its protection against vote dilution is not confined to racial groups.

Applied to the case at bar it is apparent that the defendants have ignored equal protection concepts in the assignment of committee posts, have created a built-in bias against plaintiffs and other minority party Members of Congress, and have made members of the Democratic caucus more equal than others.

Moreover, this Court, in the 1983 case of *Regan* v. *Taxation With Representation*, —— U.S. ——, 103 S. Ct. 1997 (1983), reaffirmed the doctrine that the Due Process

Clause imposes on the federal government the same requirements that are imposed on state governments by the Fourteenth Amendment; the Equal Protection Clause of the Fourteenth Amendment applies to the federal government by virtue of the Fifth Amendment.

III.

Justice Stevens also points out in *Karcher* that "constitutional adjudication that is premised on a case-by-case appraisal of the subjective intent of local decision makers, cannot possibly satisfy the requirements of impartial administration of the law that is embodied in the Equal Protection Clause . . . ." Slip. Op. at 11.

It is obvious that the court of appeals in the case at bar has approached the issues presented on a case-by-case basis. The court premised its authority to act or to refuse to act on precisely such an arbitrary basis and ignores the requirements of impartial administration of the law called for by Justice Stevens.

IV.

In the case of *Keating* v. *Carey*, 51 U.S.L.W. 2660 (April 18, 1983) the Second Circuit discussed the question of equal protection of the law under 42 U.S.C. § 1985(3). That court in construing the case of *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971) and the historic background of the Ku Klux Klan Act, pointed out that narrow interpretation of the Civil Rights Act, as restricted to racial groups and minorities, was historically untenable. The court noted that the Ku Klux Klan was a political organization intent on establishing the Democratic Party in the South. To suggest that Congress did not intend to extend its protection to the Republican Party by passing the Civil Rights Act is to turn history "on its head" and exclude the group that was foremost in the mind of Congress when the law was enacted. The court also pointed out that denial of equal

privileges and immunities because of association with the Republican Party may be a class-based, invidious discrimination that is prohibited by this Act.

In light of this court's views of the Civil Rights Act as announced in *Kush* v. *Rutledge*, —— U.S. ——, 103 S. Ct. 1483 (1983), it appears that the discrimination and failure to afford equal protection as alleged in the case at bar would give rise to a statutory cause of action in addition to those originally pleaded. If this Court grants certiorari and ultimately this matter is remanded, such an amendment to the pleadings would be made.

CONCLUSION

Particularly in light of the additional authority presented herein, the petitioners again urge this Court to grant certiorari in this case which raises unique and fundamental constitutional issues.

Respectfully submitted,

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